No. 96-1190

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WENDY L. KERN,

Petitioner,

v.

CITY OF ROCHESTER, FIRE DEPARTMENT OF THE CITY OF ROCHESTER, POLICE DEPARTMENT OF THE CITY OF ROCHESTER, ROCHESTER FIREFIGHTERS ASSOCIATION, INC., LOCAL 1071 IAFF; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, DANIEL CAVUOTO, Individually and as President of Local 1071, IAFF and as a Full Time City of Rochester Employee and Lt. in the City of Rochester Fire Department, CHARLES D. IPPOLITO, Individually and as Chief of the City of Rochester Fire Department, and LLOYD ELDRIDGE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS' BRIEF IN OPPOSITION

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RESPONDENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Procedural History of the Case

Petitioner Wendy Kern filed a Complaint in the U.S. District Court for the Western District of New York on June 28, 1993 against several named defendants, alleging

violations of her federal constitutional rights of due process, equal protection of the law, and free speech, as well as unlawful discrimination on the basis of sex. The Complaint also set forth a number of state law claims, including: discrimination on the basis of sex, assault, battery, breach of employment contract, slander, intentional infliction of emotional harm and prima facie tort.

Specifically, Kern alleged in her Complaint that after she became employed in September, 1992 as a secretary for the Rochester Firefighters Association, Inc., Local 1071 [hereafter referred to as "Local 1071" or "the Local"], the Local's president, defendant Daniel Cavuoto, frequently engaged her in unwanted conversations involving sexual content, engaged in acts of sexual harassment, and on December 30, 1992, physically assaulted her in the restroom within Local 1071's office. Kern also alleged that she then reported the December 30, 1992 incident to the Rochester Police Department, and that agents of the Department breached a public trust and confidence such that defendant Cavuoto learned that she had complained to the police. Kern further alleged that she also complained about defendant Cavuoto's conduct to John McMenemy, a lieutenant in the Rochester Fire Department and treasurer of Local 1071, who provided aid and protection to her against possible further harm. Kern contends that because of McMenemy's supportive actions, McMenemy was denied a promotion to fire captain by Rochester Fire Chief (and co-defendant) Charles Ippolito.

Notably, the *only* factual allegation in the entire Complaint specifically directed at the International Association of Fire Fighters [hereafter, "IAFF" or "the International"] is a speculative and conclusory assertion that

> "[u]pon information and belief, the parent union has been fully informed of defendant Cavuoto's conduct and plaintiff's complaints. Although it has a duty

> and responsibility to act when a local union president has violated the law, it has failed to act.

(J.A. 18, ¶ 54).[1]

As the *sole* cause of action against the IAFF, Kern asserted a claim under *state* law that it is liable in damages for aiding and abetting other defendants' acts of discrimination and/or retaliation. (J.A. 22, ¶¶ 76-79).

As their initial response to the Complaint, each defendant moved separately to dismiss the action. Kern filed a written opposition to each of these motions and at the same time cross-moved for leave to file an amended Complaint for the purpose of asserting (for the first time) a claim for relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

On November 23, 1993, the district court, per the Hon. Michael A. Telesca, issued a decision and order, which granted the dismissal motions of all defendants, and held that Kern's allegations based on federal law failed to state a claim upon which relief could be granted. (J.A. 686-693) Judge Telesca then denied Kern's motion to file an Amended Complaint as being an act of futility since the proposed Amended Complaint, on its face, failed even to allege a valid cause of action pursuant to the legal requisites of Title VII. (J.A. 693-695) Accordingly, in view of Kern's failure to allege any valid federal claim, Judge Telesca appropriately exercised his discretion pursuant to 28 U.S.C. § 1367(c)(3) and dismissed all of her state law causes of action (including the only cause of action alleged against the IAFF). (J.A. 696).

Kern subsequently submitted a new motion to file an Amended Complaint. However, the only federal claim

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[1] Citations in this form are to the Joint Appendix submitted on appeal to the U.S. Court of Appeals for the Second Circuit in the case below, *Kern v. City of Rochester*, 93 F.3d 38 (2d Cir. 1996).

alleged in the new proposed amended pleading was a Title VII claim against defendants Cavuoto and Local Union 1071; there was no claim asserted under 42 U.S.C. § 1985(3). Kern did not set forth a Title VII claim, or any other federal claim, against the IAFF, but merely realleged the same state law claim against the IAFF that was contained in her original Complaint. (J.A. 730, ¶¶ 70-73.

In a decision issued on December 1, 1994, Judge Telesca denied Kern's motion to file an Amended Complaint. In this decision, Judge Telesca noted that Kern was attempting to sue Local 1071 under Title VII *as an employer*, and held that she must therefore demonstrate that Local 1071 itself met the statutory definition of "employer". (J.A. 932). At the same time, because the resolution of this question involved a disputed issue of fact (i.e., whether Local 1071 employed 15 or more persons for each working day in each of 20 or more calendar weeks in the relevant year; *see* 42 U.S.C. § 2000e(b)), Judge Telesca ordered that a hearing be held to resolve this issue.

A hearing on this singular issue was held in the district court on August 28, 1995. Both Kern and Local 1071 presented detailed written proffers of evidence, affidavits, documentary exhibits and memoranda of law. Judge Telesca subsequently issued a decision and order on October 5, 1995 in which he concluded that, based on all the evidence, Local 1071 was not an "employer" within the meaning of that term under Title VII since it "had only five employees during all times relevant to [Kern's] complaint." (J.A. 1025). In reaching this decision, Judge Telesca thoroughly examined the relationship between the IAFF and Local 1071, and held that Kern had failed to meet her burden of proving that Local 1071 and the IAFF were a single entity or that Local 1071 was an agent of the IAFF. (J.A. 1025). He found that Local

1071 was a separate, autonomous entity that managed and controlled its own business affairs.

In a decision issued August 15, 1996, the Court of Appeals for the Second Circuit, without dissent, affirmed the District Court's rulings. The Second Circuit denied Kern's petition for rehearing and suggestion for rehearing en banc by Order dated October 15, 1996. No judge of the appellate court requested that a vote be taken on Kern's suggestion for rehearing en banc.

B. Statement of Facts Material to the Issues Involving the IAFF

The IAFF is an unincorporated labor organization with its offices and principal place of business in Washington, D.C. The membership of the IAFF is comprised of professional fire fighters employed by public and private sector employers in the United States and Canada. (J.A. 534, ¶ 3).

Rochester Firefighters Association, Local 1071, is an incorporated labor organization with its principal place of business in Rochester, NY. It is the collective bargaining agent of the fire fighters employed by the City of Rochester and its Fire Department. Local 1071 is a local union affiliate of the IAFF. (J.A. 534, ¶ 4).

The Constitution and By-Laws of the IAFF which sets forth the internal governing laws under which the International functions, including a provision empowering its President to interpret and apply said laws, ensures the autonomy of every local affiliate. The Certificate of Affiliation which is issued to each local union upon affiliation with the IAFF, also known as a charter, specifically reserves such autonomy to every local union affiliate (including Local 1071). (J.A. 534, ¶ 5).

Consistent with the policy of the IAFF and pursuant to the IAFF's Constitution and By-Laws, Local 1071 is

an autonomous, self-governing, separately chartered organization. Local 1071 and the IAFF have no common officers, no common treasury, and no common physical facilities. The IAFF does not control the day-to-day affairs of Local 1071, and has no authority to approve or disapprove any action Local 1071 might take (or has taken) as the collective bargaining or legislative representative of its members. In short, the IAFF has not at any time represented City of Rochester fire fighters in their employment relationship with the City or in their legislative or political activities on the local level. (J.A. 535, ¶ 7).

No agent of the International oversees the affairs of any local affiliate, and the International does not have the power to impose a trusteeship on its subsidiary bodies. The International transacts its business solely through its own officers and representatives. Under the International's Constitution and By-Laws, the local unions affiliated with the International are not empowered to, and do not in fact, transact the business of the International. Conversely, the International is not empowered to, and does not in fact, transact the business of its affiliated local unions. (J.A. 536, ¶ 9).

Local 1071 has at all times selected its own officers, agents and representatives pursuant to the provisions of its own local union constitution. It also chooses—without approval or confirmation from the International—its own staff employees. Local 1071 pays its expenses, including its employees' salaries and benefits, solely from its own funds, and its officers, agents, representatives and employees are responsible only to the membership of Local 1071. (J.A. 536, ¶ 10).

The members of Local 1071 establish procedures for the conduct of the local's affairs and business. They set initiation fees, reinstatement fees, monthly membership dues, assessments and any increases in the same. Local 1071, through its officers and/or members, determines

all the terms and conditions of employment of its employees. (J.A. 537, ¶¶ 11-12).

At no time has any officer, representative or employee of the IAFF controlled, dominated or directed the activities of Local 1071. At all times specified in both Kern's original Complaint filed in the district court and her proposed Amended Complaint (and at all times subsequent thereto up to the present) neither Local 1071 nor any of its current or former officers or members (including defendant Daniel Cavuoto) could have been, or were in fact, the agents, servants, employees or representatives of the International (or of the International's officers) and none of the alleged activities of any officer or member of Local 1071 was within the scope of any agency relationship with the International. (J.A. 537, ¶¶ 13-14).

The IAFF has never played any role or voiced any opinion regarding any aspect of Appellant Kern's employment relationship with Local 1071. No officer, employee or agent of the IAFF has ever assaulted, harassed, threatened, verbally abused or made public statements of any kind about Appellant Kern. Further, no officer, employee or agent of the IAFF has ever authorized, supported, or ratified such conduct. (J.A. 537, ¶¶ 15-16).

Contrary to Kern's bald assertions, prior to being served with Kern's initial Complaint filed in the district court, the IAFF never received any oral or written communication from any source about any prior acts of Daniel Cavuoto relating to sexual harassment and/or sexual propositioning of plaintiff Kern or of any other past or present employee of Local 1071. Similarly, the IAFF never received any oral or written communication from any source about any prior acts of Daniel Cavuoto relating to a physical assault against plaintiff Kern. (J.A. 538, ¶¶ 17-18).

Simply and accurately stated, the IAFF has had no interest or involvement whatsoever in Kern's employment relationship with Local 1071, and it has never entered

into any express or implicit agreements with any person or entity that would affect her employment in any way. (J.A. 539, ¶ 21).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT

Contrary to the petitioner's suggestion, there is no divergence of authority among the circuits as to whether an employee of a local union has standing to bring Title VII claims against an entity that is not her employer, but rather employs individuals who also happen to be members of the local union. Rather, all of the cases relied upon by Kern, as well as the decision of the Second Circuit below, require that to fall within the statutory definition of "employer" the entity must "significantly affect[] access" of the individual to employment opportunities. *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), *quoted in Kern v. City of Rochester*, 93 F.3d 38, 45 (2d Cir. 1996).

For example in *Carparts Distribution Center v. Automotive Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994), an employee brought a claim under the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*, against a trade association and its insurance plan in which the employee was a participant. The issue, as defined by the court, was whether the Association and Plan were so intertwined with Carparts so that they could be deemed the plaintiff's employer. Relevant to this inquiry is "whether defendants had the authority to determine the level of benefits that would be provided to Carparts' employees;" "whether Carparts shares in the administrative responsibilities that result from its employees' participation in" the Plan; and whether the defendants were agents of Carparts. *Carparts*, 37 F.3d at 17.

The decision of the Second Circuit, below, is entirely consistent with *Carparts* in that the Second Circuit looked at whether the City and Local were "closely intertwined" with respect to Kern's terms and conditions of employment. Specifically, the Court examined whether Local 1071 had delegated any of its employment responsibilities to the City; whether the City shared any of Local 1071's administrative responsibilities respecting employment; and whether the City had authority or control over other terms and conditions of Kern's employment with Local 1071 (and then concluded—correctly—that the record below provided no support for Kern on any of the purely factual issues). *Kern*, 93 F.3d at 45. Thus, there is no conflict between the Second Circuit's decision here, and that of the First Circuit in *Carparts*.

The remainder of the cases relied upon by Kern involve hospital settings where hospitals, by denying privileges and contracts,[2] refusing to refer patients,[3] or evaluating participants in a residency program,[4] significantly affected individual's access to employment opportunities at the hospitals. Again, this is the very standard adopted by the Second Circuit in *Spirt*, and applied by the Second Circuit in the instant case.

Moreover, one of the cases relied on by Kern, *Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986), was recently *overruled* by the Seventh Circuit in *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487 (7th Cir. 1996). In *Alexander*, the Seventh Circuit held that in deciding whether a hospital can be considered an em-

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[2] *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870 (6th Cir. 1991); *Pardazi v. Cullman Medical Center*, 838 F.2d 1155 (11th Cir. 1988); and *Gomez v. Alexian Brothers Hosp.*, 968 F.2d 1019 (9th Cir. 1983).

[3] *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973).

[4] *Zaklama v. Mt. Sinai Medical Center*, 842 F.2d 291 (11th Cir. 1988).

ployer of a physician who has staff privileges, courts must apply an employee/independent contractor analysis, focusing on the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work. *Id.* at 492-93.

Thus, there is no conflict among the circuits with respect to this issue. Rather, Kern is attempting to manufacture a conflict, because the facts in this case plainly demonstrate that Local 1071 and the City are not closely intertwined with respect to Kern's terms and conditions of employment. As found by the court below:

> Local 1071 . . . has not delegated any of its employment responsibilities to the City. Furthermore, there is no indication that the City shared any of Local 1071's administrative responsibilities. The City had no authority to hire or fire Kern, to supervise her work or conditions of employment, to determine her rate or method of pay, or to maintain records of her employment.

Kern, 93 F.3d at 45. Given these facts, no Circuit Court would likely find Kern to have standing to pursue her Title VII claim against the City. Succinctly stated, there is no divergence of authority among the circuits on this issue, and further review by this Court is unnecessary.

II. THE DECISION BELOW CORRECTLY HELD THAT IN ORDER TO SUE A LABOR ORGANIZATION AS AN EMPLOYER UNDER TITLE VII, THE LABOR ORGANIZATION MUST MEET THE STATUTORY DEFINITION OF "EMPLOYER"

Kern is urging this Court to overturn the well-established, logical principle that in order to maintain a Title VII action against a labor organization in its capacity as an employer, the labor organization must meet the statutory definition of employer (42 U.S.C. § 2000e(d), (e)). The argument put forth by Kern in this case has been uniformly rejected by every court that has considered

it, and there is no reason for this Court to review this settled statutory interpretation.

Kern, like others before her, relies exclusively on very old interpretations issued by the Equal Employment Opportunity Commission (EEOC) wherein that agency determined that jurisdiction lies over a labor organization in its capacity as an employer without the need to show that the organization actually falls within the statutory definition of "employer." The U.S. Court of Appeals for the Ninth Circuit recently addressed, and rejected, this very argument in the context of labor organization respondents in *Herman v. United Bhd. of Carpenters*, 60 F.3d 1375 (9th Cir. 1995), an ADEA case interpreting statutory language identical to that in Title VII.

In *Herman*, the Ninth Circuit concluded that "when a union is being sued in its capacity as an employer, it must meet the statutory definition of "employer" rather than some other statutory provision." *Id.* 60 F.3d at 1384-85. With respect to the dated EEOC interpretations, the *Herman* court found that "in the twenty-five years since those [EEOC] decisions, no federal court has adopted [the EEOC's] view." *Id.* 60 F.3d at 1384.

It is not surprising that the EEOC's position has failed to gain the acceptance of even one court. As the Ninth Circuit persuasively noted, a labor organization may have dual roles—it can function as a representative of employees and it can also function as employer. *Id.* This distinction is not to be overlooked, since there is no indication anywhere in Title VII that a labor organization, when sued by an employee for discrimination growing out of his/her employment with the organization, should be treated differently than any other employer. *Accord Greenless v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197, 198-99 (5th Cir. 1994); *Chavero v. Local 241, Division of Amalgamated Transit Union*, 787 F.2d 1154, 1155 n.1 (7th Cir. 1986).

A. Local 1071 and the IAFF Are Not So Closely Connected That They Can Be Deemed to Be a Single Entity, Nor Is Local 1071 the Agent of the IAFF

It is by now well-established that the appropriate legal test by which to determine whether the employees of two organizations can be counted together in order to satisfy the jurisdictional minimum under Title VII is a four-part test which examines the following factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial controls. (J.A. 1023-1024). *Herman v. United Bhd. of Carpenters, supra,* 60 F.3d at 1383; *Switalski v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers,* 881 F. Supp. 205, 208 (W.D. Pa. 1995), and cases cited therein. The relationship between Local 1071 and the IAFF is so attenuated that none of these factors are satisfied.

Clearly, the operations of Local 1071 and the IAFF are not intertwined even minimally. The IAFF presented affidavit testimony in the district court—unrebutted by Kern—providing that it does not in any way control the day-to-day business affairs of Local 1071. The Local has its own constitution, negotiates its own labor contracts, determines on its own how to resolve disputes with the City of Rochester, and shares no physical facilities with the IAFF. In short, in every aspect of its business dealings, Local 1071 acts independently of the IAFF.

Turning to the management of the two entities, it is also undisputed that the two organizations elect their own officers, and that there are no common officers between Local 1071 and the IAFF.[5] Accordingly, Kern

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[5] Kern's suggestion that the IAFF's decision to postpone Local 1071's March 1994 election establishes an agency relationship is without merit. The authority of the IAFF, found in its Constitution and By-Laws, to postpone a local union election in response to an election protest filed by a member does not establish an agency

was unable to prove (nor could she ever prove) the existence of common management.

As to the third factor—the degree to which control over labor relations is centralized—the undisputed record evidence below also showed that Local 1071 conducts its own labor relations without any direction or input from the IAFF. The Local determines, on its own, who to hire, what salary and benefits to give its employees, and all associated terms and conditions of employment of its employees.[6]

In addition, Kern's reliance on the charge and hearing procedures set forth in Articles XVI and XVII of the IAFF Constitution and By-Laws is clearly misplaced. Kern, as a non-member, has absolutely no legal basis for asserting any right to rely on these internal union procedures and obtain enforcement for her benefit.

Examining the final factor in the "single entity" test—common ownership or financial controls—there is no dispute that the IAFF and Local 1071 have separate treasuries. Local 1071 pays all of its expenses out of its own

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relationship. *See generally Childs v. Local 18, IBEW*, 719 F.2d 1379, 1382 n.2 (9th Cir. 1983). Moreover, the IAFF's decision to postpone Local 1071's March 1994 election was completely unrelated to Kern's employment relationship with Local 1071, and Kern has not—and cannot—provide any facts to the contrary.

[6] While Kern apparently attempts to show that the IAFF had some control over Local 1071's employee relations by asserting that the IAFF had a duty to discipline former Local 1071 president Cavuoto for misconduct, such argument is flawed in several respects.

Even aside from the fact that prior to being served with a copy of Kern's complaint in the district court the IAFF was never informed of any sexual harassment or assault allegedly committed by Mr. Cavuoto, it is well established that an international union has no duty to intervene in matters that are confined to the local union level. *See Phelan v. Local 305*, 973 F.2d 1050, 1061 (2d Cir. 1992); *Rodonich v. House Wrecker's Union Local 95*, 817 F.2d 967, 974 (2d Cir. 1987).

funds. Further, the Local determines the amount of its initiation fee, monthly membership dues and all other assessments. Accordingly, as is the case with the other three factors, common ownership is also absent.[7]

Kern fares no better in arguing that Local 1071 is the IAFF's agent. The unequivocal fact is that the IAFF Constitution and By-laws mandates that each local union affiliate shall have complete autonomy in conducting its day-to-day affairs. Each local affiliate—including Local 1071—elects its own officers, collects its own dues, maintains its own treasury, *hires its own employees,* pays its own expenses, and conducts its own business without having to first obtain approval or confirmation from the IAFF. In short, the IAFF is not empowered to, and does not in fact, transact the business of Local 1071 or any of its other affiliate locals.

Conversely, the IAFF transacts its business solely through its own officers and representatives. Under this same IAFF Constitution and By-Laws, local unions affiliated with the IAFF are not empowered to, and do not in fact, transact the business of the International. Hence, at no time has Local 1071 or any of its officers or members (including defendant Cavuoto) been the representative or agent of the IAFF, nor has any of the (mis)conduct allegedly engaged in by Local 1071 (or by Cavuoto) been within the scope of any authorized agency relation-

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[7] Kern contends that because the IAFF selected an accountant to audit the financial records of Local 1071—at Local 1071's request—such action indicates that the IAFF exercises substantial control over the financial affairs of the Local. While it is true that the IAFF has the authority to audit the books of its local affiliates, mere potential power such as this, the exercise of which is contingent upon the happening of some event (such as an express request from the Local) does *not* constitute the type of financial control that the "single entity" test contemplates. *See Switalski v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers,* 881 F. Supp. 205, 208 (W.D. Pa. 1995) (citing *Baker v. Stuart Broadcasting Co.,* 560 F.2d 389 (8th Cir. 1977)).

ship with the IAFF. Accordingly, no agency relationship exists. *See e.g., Boss v. Int'l Bhd. of Boilermakers,* 567 F. Supp. 845, 847 (N.D.N.Y.), *aff'd* 742 F.2d 1446 (2d Cir. 1983), *cert. denied,* 469 U.S. 819 (1984); *Childs v. Local 18, IBEW,* 719 F.2d 1379, 1382 n.2 (9th Cir. 1983); *Borowiec v. Local No. 1570,* 889 F.2d 23, 28 (1st Cir. 1989). In sum, Kern has failed to put forth any persuasive reasons for reviewing the Second Circuit's conclusion that Local 1071 is neither a single entity with, nor agent of, the IAFF.

Lastly, Kern is clearly mistaken in her belief that the issues presented in her petition are of exceptional importance. On the contrary, in this case the Second Circuit merely applied well-established principles of law to the uncontroverted facts and reached the unremarkable conclusion that Kern has failed to state any viable federal claim against any of the respondents.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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